Supreme Court, U.S.
FILED

No. _____

001484 FEB 26 2001

In The
Supreme Court of the United States

ROBERT D. CUNNINGHAM JR.
Petitioner,

v.

CARMEN R. NAZARIO,
STATE OF DELAWARE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
Defendants

and

Charles Konigsberg
Defendant

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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March 13, 2001

QUESTIONS PRESENTED

I. Do non-handicapped individuals have the right to file administrative complaints with the U.S. Department of Education under 20 U.S.C.S. §§ 1400 et seq? (According to Cunningham v. Nazario, they do not; but according to the U.S. Department of Education in papers filed in both Cunningham v. Nazario and Cunningham v. Riley they do.) If so, does the pursuit of this administrative remedy toll the statute of limitations for filing a similar complaint with the Court under 42 U.S.C.S. § 1983?

II. Do non-handicapped individuals have the right to file administrative complaints on the behalf of the handicapped with the U.S. Department of Education under Section 504 of the Rehabilitation Act of 1973? (According to Cunningham v. Nazario they do not; according to the U.S. Department of Education and the court in Cunningham v. Riley they do.) If so, does the pursuit of this administrative remedy toll the statute of limitations for filing a similar complaint with the court under 42 U.S.C.S. § 1983? If the non-handicapped individual filing this administrative complaint is dissatisfied with the response from the U.S. Department of Education, may the individual file the same complaint and receive de novo consideration of it in the courts under Section 504? (The court in

Nazario says no; the court in Riley says yes.)

III. Do non-handicapped individuals have the right to file administrative complaints alleging illegal retaliation with the U.S. Department of Education under Section 504 of the Rehabilitation Act of 1973? (According to the court in Cunningham v. Nazario, they do not; according to the U.S. Department of Education and the court in Cunningham v. Riley, the whistleblower provision incorporated into Section 504 confers this protection on the non-handicapped.) If so, may the pursuit of this administrative remedy toll the statute of limitations for filing a similar complaint with the court under 42 U.S.C.S. § 1983? If the non-handicapped individual filing this administrative complaint is dissatisfied with the response from the U.S. Department of Education, may the individual file the same complaint and receive de novo consideration of it in the courts under Section 504? (Nazario says they may not; the court in Riley says they may.)

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Robert D. Cunningham Jr. petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The judgment of the Court of Appeals, App., infra, 1a - 6a, is unpublished. The opinion of the District Court, App., infra, 7a - 19a, is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 27, 2000, App., infra, 1a - 6a. A motion for rehearing was denied on October 4, 2000, App., infra, 61a - 62a. An application for an extension of time in which to file this Petition for Writ of Certiorari was granted on December 18, 2000, extending the filing deadline to and including March 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

In July, 1988, Robert D. Cunningham Jr. was hired to work as a developmental pediatrician by the Delaware Department of Health and Social Services (DDHSS) in Delaware's Child Development Watch (CDW) program. The purpose of this state-run program is to identify children who either have, or who are at high risk for developing, developmental disabilities, including mental retardation, cerebral palsy, and autism. The program currently receives federal funding through the U.S. Department of Education (DOE).

While working for the CDW program, Cunningham was told by administrators within DDHSS to withhold diagnoses such as mental retardation, cerebral palsy, and autism from families. Cunningham was told by DDHSS that such dire diagnoses would unduly upset families. In addition, Cunningham was told by DDHSS that the families, once aware of these diagnoses, would press the state of Delaware for additional services, which Delaware would be legally obligated to provide but which Delaware could not afford to pay for.

Cunningham pointed out to DDHSS that such a policy of withholding diagnoses is unethical, falling outside the realm of acceptable medical practice for a clinic specializing in the diagnosis of handicapping conditions in children. Cunningham stated to DDHSS that he would refuse to adhere to such a policy on the grounds that it is unethical, discriminatory, and could be considered grounds for medical malpractice complaints. DDHSS told

Cunningham that if he refused to adhere to this policy, then he would not be allowed to continue working in the CDW clinics. Cunningham stated that he would choose not to work in the CDW clinics rather than engage in the unethical and illegal practice of withholding diagnostic information from families.

In accordance with Delaware's Merit Rules system (Delaware State Merit Rule 20.0410 App., infra, 71a) an attempt is to be made to resolve all complaints administratively, "within house," before involving outside agencies, such as the federal government. In February, 1989, Cunningham sent a complaint to the Director of the Delaware Division of Public Health (part of DDHSS) stating that Cunningham was being threatened with the loss of his job because of his policy of disclosing diagnoses to the families of handicapped children. Cunningham stated that he would give up his job rather than withhold diagnostic information.

In violation of the Merit Rules (Delaware State Merit Rule 20.0330, App., infra, 71a) there was no response by the Director of the Division of Public Health to Cunningham's administrative complaint. Instead, DDHSS directed Cunningham to submit a letter of resignation. In March, 1989, Cunningham submitted a letter of resignation. A few days later, before the resignation took effect, Cunningham lost control of the state-owned automobile he was driving to a rural clinic and was crushed inside the vehicle. (A few weeks earlier, Cunningham had been warned by DDHSS that refusing to withhold

diagnostic information from the families of handicapped children could have an "adverse impact" on his career.)

Despite the letter of resignation, Cunningham continued to work in the CDW clinic on a part-time basis during the month of June, 1989. When DDHSS continued to insist that Cunningham withhold diagnostic information from the families of handicapped children, Cunningham stopped all work.

Cunningham was begun on worker's compensation payments by Delaware around May, 1989, and the payments were continued until March, 1995. When the worker's compensation administrators contacted Cunningham in July, 1989, to find out why he was no longer working, Cunningham stated that he was no longer working for the state not because he was physically unable to but because he was refusing to, because he was being asked to withhold diagnostic information from the families of handicapped children, a practice which Cunningham described to the worker's compensation administrator as being unethical and possibly illegal. The worker's compensation administrators decided to continue paying Cunningham worker's compensation payments until such time that Cunningham found work that paid a salary that was comparable to the salary that he was being paid before the automobile accident, or for a length of 60 months.

Over a period of the next several years, while continuing to receive worker's compensation payments, Cunningham continued to attempt to resolve the situation administratively through procedures described in

Delaware's Merit Rules, but made no progress. In 1993 and 1994 Cunningham attempted to fill physician vacancies in the CDW clinic but was refused employment opportunities when he refused to agree to withhold diagnostic information from the families of handicapped children. In February, 1994, Cunningham met with an attorney with the Delaware Department of Justice to voice his concerns about illegal discrimination against handicapped children and retaliation against himself when he voiced these concerns to DDHSS. Shortly afterward, Cunningham received a phone call from the same attorney, suggestive that Cunningham's worker's compensation payments would be cut off and some sort of legal action would be taken against Cunningham if Cunningham continued to pursue these discrimination claims.

In February, 1994, Cunningham filed a complaint of discrimination with the Civil Rights Division of the U.S. Department of Justice. In June, 1994, the U.S. Department of Justice determined that it did not have jurisdiction over the complaint and forwarded it to the Office for Civil Rights of the U.S. Department of Health and Human Services. In July, 1994, the U.S. Department of Health and Human Services determined that it did not have jurisdiction over the complaint and forwarded it to the U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSER). OSER determined that it did have jurisdiction over the portion of the complaint involving Part H of IDEA (Individuals with Disabilities Education Act), but also suggested that

allegations made of illegal retaliation against Cunningham be brought to the attention of the Office for Civil Rights of the U.S. Department of Education.

On May 14, 1996, the case of Robert D. Cunningham Jr. v. Carmen R. Nazario, State of Delaware Department of Health and Social Services and Charles Konigsberg was filed in the U.S. District Court for the District of Delaware. In a 42 U.S.C.S. § 1983 claim in Nazario, Cunningham argued that the exchange of diagnostic information between physicians, including Cunningham, and their patients is protected by the First Amendment Right of free speech. In addition, Cunningham argued that the disclosure of diagnostic information to the families of handicapped children is protected by the right of privacy deriving from the Fifth and Fourteenth Amendments of the U.S. Constitution. Cunningham also argued that withholding diagnostic information from the families of handicapped children for the purpose of deterring the families of handicapped children from availing themselves of services that they would otherwise be legally entitled to violates Section 504 of the Rehabilitation Act of 1973. And finally Cunningham argued that he, himself, was being illegally retaliated against in violation of 34 CFR § 100.7(e), an implementing regulation of Section 504, because he had taken actions to protect the handicapped from discrimination. Shortly after filing Nazario, the Delaware Department of Justice threatened to have Cunningham investigated for fraudulently collecting worker's compensation payments.

The defendants in Nazario argued

that Cunningham does not have standing to file complaints under 42 U.S.C.S. § 1983 (First Amendment and right of privacy allegations) on the behalf of the handicapped with the courts. Furthermore, the defendants argued that Cunningham did not meet the statute of limitations for filing his 42 U.S.C.S. § 1983 claims. In addition, the defendants argued that Cunningham did not, nor does he have standing to, file administrative complaints on the behalf of the handicapped with the U.S. Department of Education under the Individuals with Disabilities Education Act because Cunningham himself is not a beneficiary of this act. Finally, the defendants argued that Cunningham does not have standing to file complaints on the behalf of the handicapped under Section 504 of the Rehabilitation Act of 1973.

Cunningham argued: 1) Physicians have the right to file claims as a third party on the behalf of their patients; 2) the defendants were well aware that Cunningham had filed administrative complaints on the behalf of the patients seen in the CDW clinic with the Office of Special Education and Rehabilitative Services (OSER) of the U.S. Department of Education and that the U.S. Department of Education recognizes Cunningham's right to file these complaints under 34 CFR § 303.511, an implementing regulation of 20 U.S.C.S. §§ 1400 et seq (part of IDEA); 3) Cunningham also has the right to file administrative complaints under 34 CFR § 100.7(b), an implementing regulation of Section 504 of the Rehabilitation Act of 1973, and that the U.S. Department of Education

recognizes Cunningham's right to file these complaints; 4) Cunningham could not file his First Amendment and privacy claims under 42 U.S.C.S. § 1983 in court until he had exhausted all administrative remedies, including administrative remedies available through Delaware's Merit Rules system, and administrative complaints filed under 34 CFR § 303.511 with the U.S. Department of Education. The administrative complaint process was begun while Cunningham was seeing patients in the CDW clinics and dragged on for a number of years; 5) the statute of limitations for filing his 42 U.S.C.S. § 1983 and Section 504 complaints was tolled until these possible administrative remedies were exhausted.

In a memorandum opinion issued by the U.S. District Court for the District of Delaware on August 29, 1997 (App., infra, 20a - 43a) the Court mistakenly concluded that the U.S. Department of Education had determined that Cunningham does not have standing to file administrative complaints on the behalf of the handicapped under IDEA. The Court reached the following conclusions: 1) Cunningham, because he is no longer seeing patients in the CDW clinics, is no longer maintaining a relationship with the handicapped population, and therefore does not have standing to file First Amendment and privacy claims for this population under 42 U.S.C.S. § 1983 with the Court (App., infra, 33a - 36a); 2) the statute of limitations bars Cunningham from filing First Amendment claims on his own behalf. Cunningham cannot argue that the statute of limitations was tolled while pursuing

administrative remedies through IDEA because Cunningham has no rights under IDEA (App., infra, 40a - 42a); 3) Cunningham does not have standing to file Section 504 claims on behalf of the handicapped (App., infra, 33a - 36a); 4) Cunningham cannot claim that his own Section 504 rights were violated, because Section 504 only provides protection to the handicapped, and since Cunningham himself is not handicapped, he has no rights under Section 504, and cannot claim that Section 504 was violated when he lost his job with the CDW clinic (App., infra, 39a [note]).

The above ruling was appealed to the U.S. Court of Appeals for the Third Circuit and affirmed without comment on February 17, 1998. A petition for a writ of certiorari was filed with the U.S. Supreme Court and denied on June 3, 1998.

Robert D. Cunningham Jr. v. Carmen R. Nazario, State of Delaware Department of Health and Social Services and Charles Konigsberg: Rule 60(b) Motion

In August, 1998, Cunningham filed a motion in Nazario under F.R.C.P. Rule 60(b). In the motion, Cunningham argues that the defendants in Nazario deliberately misrepresented actions taken by Cunningham to achieve administrative remedies in the case, and also misrepresented the rulings of the U.S. Department of Education regarding Cunningham's right to file these administrative complaints. In a response to a subpoena, the Office of Special Education and Rehabilitative

Services of the U.S. Department of Education stated that Cunningham has filed administrative complaints on the behalf of the handicapped under 34 CFR § 303.511 (an implementing regulation of IDEA), and that Cunningham does indeed have the right to file these administrative complaints alleging that Delaware is not complying with the requirements of IDEA in the implementation of its programs. In response to a subpoena, the Office for Civil Rights of the U.S. Department of Education stated that Cunningham has filed administrative complaints on the behalf of the handicapped under 34 CFR § 100.7(b) (an implementing regulation of Section 504), and that Cunningham has standing to file these complaints alleging illegal discrimination against the handicapped. In addition, the Office for Civil Rights stated that although Cunningham himself is not handicapped, he is still protected under Section 504 from retaliation for taking action to protect the handicapped from discriminatory practices under 34 CFR § 100.7(e). A subpoena was approved to have the U.S. Department of Education answer questions regarding its understanding of the law regarding whether Cunningham or other non-handicapped individuals have the right to file Section 504 complaints on the behalf of the handicapped directly with the courts, and whether these same individuals have the right to file claims of illegal retaliation under Section 504 directly with the courts. A few hours after the subpoena and accompanying questions were approved by the Clerk's Office of the U.S. District Court for

service, Judge Joseph J. Farnan Jr. dismissed the Rule 60(b) motion (App., infra, 7a - 19a). The motions to admit the previous statements of the U.S. Department of Education as evidence of fraud were declared moot. No discovery period for the gathering of evidence to document the presence of fraud was ever established, although Cunningham had requested a discovery period.

The ruling was appealed and the decision was affirmed by the Third Circuit Court of Appeals on July 27, 2000 (App., infra, 1a - 6a), and a motion for reargument was denied on October 4, 2000 (App., infra, 59a - 60a).

JURISDICTION OF THE DISTRICT COURT

This case involves violations of constitutional rights (App., infra, 63a) which can be pursued as violations of 42 U.S.C.S. § 1983 (App., infra, 64a), education laws written under the authority of 20 U.S.C.S. §§ 1400 et seq (App., infra, 65a - 69a), and civil rights laws written under the authority of 29 U.S.C.S. §§ 790 et seq (App., infra, 64a - 65a).

28 U.S.C.S. § 1331 gives U.S. District Court jurisdiction over the described matters.

REASONS FOR GRANTING THE PETITION

The intent of P.L. 99-457 and P.L. 102-119 is to identify children who either have, or are at risk for developing, handicapping conditions as early as possible in order that they may be enrolled in early intervention programs that may ameliorate the adverse impacts of these conditions. Among the early interventions that may be recommended include physical therapy, speech therapy, occupational therapy, and special education services. These services are labor intensive and costly to provide. And to a large degree they must be financed by government money raised through taxes.

Sometimes the conditions identified are severe disabilities: mental retardation, autism, cerebral palsy. For many parents, these are emotion-laden terms. And as is the case when any serious medical diagnosis is made, there is sometimes a tendency on the part of the patient or the patient's family of denial and anger toward the party making the diagnosis. When this type of anger occurs in a government -operated program, it makes politicians and bureaucrats exquisitely nervous.

Despite the parental anger that making a diagnosis of serious disability in a child may trigger, repeated studies have consistently shown that most members of the public do not wish to have "bad news" withheld from them.

Informed consent laws mandate that all relevant information and all information that a patient or patient's family believes might be relevant be disclosed in order for the patient

(or patient's family) to make informed choices regarding whether to accept any particular service. Since the knowledge of a particular diagnosis is likely to influence the choice of services, disclosure of the diagnosis to the patient (or patient's family) is required by the informed consent doctrine (see Canterbury v. Spence, C.A. 464 F.2d 772ff; 150 U.S. App.D.C. 263).

In regards to the programs established under Part H of IDEA, 34 CFR § 303.401(a) (App., infra, 66a - 67a) defines informed consent as meaning that the parent has been fully informed of all information relevant to the activity for which consent is sought. Under 34 CFR § 303.404(a)2 (App., infra, 67a) written parental consent must be obtained before initiating the provision of early intervention services.

This puts the physician in a bind: medical ethics and the law demands that he not withhold information from families, while bureaucrats and politicians are also telling him not to do anything that will upset families. Furthermore, providing services to handicapped children is expensive. Providing full disclosure of diagnostic information to the family of a handicapped child is likely to increase the demand for services. Although having a specific diagnosis is not required in order to qualify for services, families of handicapped children who have had diagnostic information withheld from them are less likely to seek out appropriate services than families to whom a complete disclosure of diagnostic information has been made. So there

is an economic incentive for bureaucrats and politicians to pressure physicians to withhold diagnostic information from families.

Epidemiologic studies have established the frequency with which various disabilities can be expected to be found within a given population. However, in Delaware there are approximately 2000 fewer children being identified with mental retardation than is expected, based upon the assumption that most individuals with IQ's in the mentally retarded range are indeed functionally mentally retarded. Similarly, the number of children in Delaware diagnosed with autistic-spectrum disorders is significantly less than expected based upon epidemiologic research.

The Delaware statistics suggest that many children with significant disabilities are going through school unidentified and are likely not being given complete access to the services that they are legally entitled to. The illegal withholding of diagnostic information from the families of handicapped children in Delaware is a significant barrier to the access of services.

Who has the right to file complaints on the behalf of the handicapped under Section 504, and with whom may the complaints be filed?

In Cunningham v. Nazario et al, Cunningham argued that withholding diagnostic information from the families of handicapped children for the purpose of deterring families from obtaining

services that the families are legally entitled to is discriminatory and violates Section 504 of the Rehabilitation Act of 1973. The defendants in Nazario stated that Cunningham does not have standing to file claims of discrimination on the behalf of the handicapped under Section 504, either administratively or with the court. In Nazario, Judge Joseph J. Farnan Jr. ruled for District Court:

> "In this case, the Court concludes that Plaintiff lacks standing to pursue the. . . Rehabilitation Act claims that he asserts on behalf of disabled children and families affected by the alleged mislabeling. Specifically, the Court concludes that Plaintiff has not satisfied the injury in fact requirement for standing. It is a basic premise of constitutional law, that Plaintiff, himself, must have suffered the injury that he seeks to redress. Here, Plaintiff seeks to redress alleged injuries to. . .a third party. (Citation omitted) Therefore, under the general rule, the Court concludes that Plaintiff lacks standing to bring the instant claim on behalf of third parties." (App., infra, 33a - 34a)

Shortly after Nazario was commenced, in a letter to Cunningham dated August 2, 1996, the U.S. Department of Education (DOE) stated that if no decision based upon the merits of the case was reached by the courts in Nazario, then Cunningham

could refile his administrative Section 504 complaint with the DOE. This implies that Cunningham has, at least, the right to file administrative complaints on the behalf of handicapped children under Section 504. Although a copy of this letter was given to both District Court and the defendants in Nazario, the defendants did not retract their statement regarding Cunningham's right to file complaints on the behalf of the handicapped.

Following the dismissal of Nazario, Cunningham refiled his administrative Section 504 complaint with the DOE. Pointing at 34 CFR § 100.7(b) (App., infra, 65a), the DOE again restated what the law is regarding who may file complaints on the behalf of the handicapped. According to the DOE, when 34 CFR § 100.7(b) states that "any person" may file a complaint alleging that handicapped individuals are being discriminated against, the meaning is literal: anyone, regardless of the presence or lack of disability, has the right to file complaints on the behalf of the handicapped under Section 504.

This suggests that there was a misstatement of the law in Nazario, which perhaps occurred as the result of a misrepresentation of the DOE's decisions by the defendants. In August, 1998, Cunningham filed a motion under F.R.C.P. 60(b) for reconsideration of the issue. Cunningham subpoenaed the DOE in order to obtain a precise definition of the law regarding who has the right to file complaints under Section 504. DOE responded by specifically stating that individuals

do not themselves need to be handicapped in order to file administrative complaints on the behalf of the handicapped with the DOE; there is no requirement to establish a close relationship between the person filing the claim and the disabled. Cunningham followed with a second subpoena, asking the DOE whether non-handicapped individuals have the right to file Section 504 claims on the behalf of the handicapped directly with the courts. Before the DOE could respond, the Rule 60(b) motion in Nazario was dismissed. Nothing in the memorandum opinion acknowledges the DOE's determination of the standing requirements for filing 504 claims.

On July 20, 1999, Cunningham filed suit against the DOE (Cunningham v. Riley). In a memorandum opinion authored by Judge Sue L. Robinson dated May 16, 2000, the U.S. District Court in Riley stated:

> "In processing and investigating plaintiff's complaint, OCR [Office of Civil Rights of the U.S. Department of Education] did not affect plaintiff's legal rights. At all times, plaintiff was free to file suit against the [Delaware Division of Public Health] under § 504 of the Rehabilitation Act of 1973, and the actions of OCR had no effect on such claims or their de novo review by a court of competent jurisdiction." (App., infra, 58a - 59a) [Emphasis added]

So in Nazario, District Court found, and the Court of Appeals affirmed, that

Cunningham may not file Section 504 claims on the behalf of the handicapped directly with the courts, but subsequently District Court found in Riley that Cunningham should be filing these same 504 claims against DDHSS directly with the courts, rather than filing suit against the DOE for allegedly mishandling the administrative 504 complaints involving the same matters. Was the District Court ruling in Nazario a mistake? A result of inadvertence or excusable neglect? If so, the ruling should be changeable under F.R.C.P. Rule 60(b)(1). Do the subsequent statements by the DOE regarding Cunningham's right to file Section 504 complaints on the behalf of the handicapped represent "newly discovered evidence"? If so, the ruling in Nazario should be changeable under F.R.C.P. Rule 60(b)(2). Did the defendants in Nazario deliberately misrepresent the policy of the DOE regarding who may file Section 504 claims on the behalf of the handicapped, or knowingly deceive the court about the same? If so, the ruling in Nazario should be changeable under F.R.C.P. Rule 60(b)(3). Does the difference in the statement of the rights of Cunningham by the District Court in Nazario and the statement of Cunningham's right to file Section 504 claims by the DOE and District Court in Riley represent any other reason for altering the ruling in Nazario to which F.R.C.P. Rule 60(b) may be applied?

Who has the right to file complaints of illegal retaliation under Section 504, and with whom may the complaints be filed?

In Cunningham v. Nazario et al, Cunningham alleged that he was illegally retaliated against in violation of 34 CFR § 100.7(e) (App., infra, 65a) which is incorporated into Section 504, when he took steps to point out that handicapped children were being discriminated against. In his papers, Cunningham describes a series of actions taken against him that he claims are illegal acts of retaliation. These include denial of employment for a position for which Cunningham is the best qualified candidate in violation of state Merit Rules, loss of job, threatened loss of worker's compensation payments, threatened fraud investigation, threatened F.B.I. investigation, threats directed against individuals suspected of supplying Cunningham with information about government operations, and Cunningham being crushed inside an automobile.

In a memorandum opinion dated August 29, 1997, Judge Joseph J. Farnan Jr. states the following:

> "In his Amended Complaint, Plaintiff states, 'In essence, the Plaintiff was discriminated against when he refused directions provided by the state government that were discriminatory against the handicapped. . .' To the extent that Plaintiff's Amended Complaint can be construed to state a claim under the Rehabilitation Act. . .on the basis of discrimination against the handicapped, the Court rejects the Plaintiff's claim. Even if Plaintiff was denied employment

> because of his views regarding the handicapped, he was not denied employment because he was handicapped. As such, Plaintiff has failed to state a claim that he was discriminated against in violation of. . .the Rehabilitation Act." (App., infra, 39a [note])

From the above, it appears that Judge Farnan believes that the protection of Section 504 extends only to the handicapped, not to those who take action on behalf of the handicapped.

In August, 1998, Cunningham filed his motion to have the above ruling reversed under F.R.C.P. Rule 60(b). Cunningham then subsequently subpoenaed the DOE to answer questions regarding whistleblower protection under Section 504. The DOE pointed out the whistleblower protection regulation, 34 CFR § 100.7(e) (App., infra, 65a), which seems to make clear that Section 504 does protect non-handicapped individuals from intimidatory or retaliatory acts in response to complaints filed by these individuals on the behalf of the handicapped. Yet the Rule 60(b) motion was denied by District Court, and that decision affirmed by the Court of Appeals on October 4, 2000.

In the meantime, in the concurrent case of Cunningham v. Riley, the DOE again stated that Cunningham has the right to file these complaints of violations of 34 CFR § 100.7(e) administratively with the DOE, and District Court found that Cunningham could have these same complaints considered de novo by filing a Section

504 complaint directly against the funding recipient, DDHSS.

Again, there seems to be two different statements of the law, here. In Nazario, the judge appears to have little or no awareness that 34 CFR § 100.7(e), the whistleblower protection statute, is a part of Section 504. But in Riley, the case in which the DOE is directly involved, District Court does appear to acknowledge that Cunningham, although not handicapped, may be entitled to file whistleblower allegations under Section 504 against DDHSS directly with the courts.

Who has the right to file complaints on the behalf of the handicapped under IDEA, and what effect does the filing of these complaints have on calculating the statute of limitations for filing a 42 U.S.C.S. § 1983 claim?

Cunningham contends that withholding diagnostic information violates the informed consent requirements of IDEA described in 34 CFR § 303.401 and 34 CFR § 303.404 (App., infra, 66a - 67a) plus the disclosure requirement described in 34 CFR § 303.344 and the associated implementation rules developed by the state (App., infra, 65a - 66a). Furthermore, Cunningham contends that instructing a physician to withhold diagnostic information from the families of handicapped children because the information might be upsetting to the families, or for the purpose of deterring families from seeking services to which they are legally entitled to, is a violation of the free speech and privacy protections afforded to the physician-

patient relationship. Such issues may be addressed by filing a 42 U.S.C.S. § 1983 claim against DDHSS, but first Cunningham must exhaust all reasonable means to address the issues administratively.

In Nazario, Cunningham contended that the statute of limitations for filing any 42 U.S.C.S. § 1983 claim was tolled while he was attempting administrative resolution through complaints filed by Cunningham with the state via Delaware's Merit Rules, and complaints filed by Cunningham with the DOE. In Nazario, Cunningham filed copies of complaints that he had filed with the DOE under IDEA (via 34 CFR § 303.510 - 303.512), copies of documents from the DOE instructing DDHSS to address the complaints, and copies of letters from DDHSS to Cunningham and the DOE regarding the complaints. But despite this documentation, the defendants in Nazario [mis]represented to the court that Cunningham did not, nor does he have standing to, file administrative complaints with the DOE under IDEA. The District Court ruled:

> "On the federal level, Plaintiff alleges that the U.S. Department of Education instructed the state government to resolve the complaint within a sixty day time period. . .Plaintiff alleges that the Department of Education informed him by letter that it did not have jurisdiction over Plaintiff's complaints, but that Plaintiff could pursue his claims in a court of law." (App., infra, 27a)

And:

> ". . .Plaintiff raises the argument that the statute of limitations was tolled during Plaintiff's pursuit of administrative remedies under 20 U.S.C. § 1400. . . . Redressing alleged violations of the First Amendment rights of an individual who lacks standing to raise a claim under the IDEA in the first place, is simply not within the purview of the statute. Therefore, the Court rejects Plaintiff's tolling argument, and concludes that Plaintiff's First Amendment claim is time-barred." (App., infra, 41a - 42a)

Cunningham filed a motion under F.R.C.P. Rule 60(b) in August, 1998, and subpoenaed the DOE to answer questions regarding who has the right to file administrative complaints under IDEA. The DOE, pointing to 34 CFR § 303.510 - 303.512 (App., infra, 67a - 69a), responded by saying that anyone, including Cunningham, has the right to file administrative complaints under IDEA with DDHSS and the DOE, and that Cunningham has indeed filed such complaints. These responses from the DOE were filed in support of Cunningham's Rule 60(b) motion, in which it is alleged that the defendants in Nazario deliberately misrepresented the fact that Cunningham had filed administrative complaints under IDEA and that the DOE recognizes that Cunningham has the right to file these complaints on the behalf of the handicapped. However, District

Court apparently refused to consider this information, and dismissed the Rule 60(b) motion. The Court of Appeals affirmed the dismissal on October 4, 2000.

In Riley, there is no conflict regarding whether Cunningham has filed, or has the right to file, administrative complaints with DDHSS and the DOE under IDEA. But these findings are in contradiction to the findings and rulings in Nazario regarding the same matters.

THE CHAOS OF TWO ARENAS

In essence, the decision in Nazario established two separate arenas in which allegations can be made that the rights of handicapped children described under IDEA and Section 504 are being violated, with each arena having its own version of "the law." In the arena of Nazario, only the handicapped and their families may file complaints under IDEA and Section 504 directly with the courts. Other non-handicapped individuals have no right to file complaints on the behalf of the handicapped with the courts, nor apparently do these same individuals have any recognized right to file these same complaints administratively with the U.S. Department of Education. Furthermore, non-handicapped individuals who point out that the handicapped are being discriminated against, or assist in any way with the investigation of a discrimination complaint, have no protection against retaliation, because in the arena of Nazario, Section 504 protects only the rights of the handicapped, not those who assist or advocate for the handicapped.

In contrast, in the arena of the U.S. Department of Education, non-handicapped individuals have the right to file complaints on the behalf of the handicapped under both IDEA and Section 504 administratively with the DOE. There is no "close relationship" requirement for achieving standing to file these complaints. Furthermore, according to the DOE, non-handicapped individuals may file Section 504 complaints on the behalf of the handicapped directly with the courts. And if these non-handicapped individuals are retaliated against for their activities taken on the behalf of the handicapped, they may invoke the whistleblower protection provision incorporated into Section 504 and file complaints under Section 504 against the funding recipient.

In Young v. Pierce, 544 F. Supp. 1010 (1982), a funding provider may be sued in federal court if it is alleged that the funding provider is not bearing its fair share of responsibility in the fight against discrimination. This principle provides a basis for the action taken against the DOE in Cunningham v. Riley. However, in Hannah v. Larche, 363 U.S. 420, 80 S Ct. 1502, 4 Led 2d 1307, in the absence of such an allegation against the funding provider, allegations of violations of the Section 504 rights of handicapped children should instead be filed against the funding recipient, which was the case in Nazario. It is difficult to believe that the courts intended for there to be a circumstance in which an individual could achieve standing to file Section 504 allegations against the funding

provider, yet the same individual would fail to achieve standing to file the same allegations against the funding recipient.

So, there are two separate arenas in which complaints of violations of the rights of the handicapped may be considered: the arena constructed by Nazario and the arena described by the U.S. Department of Education and recognized under Riley. Each arena has its own version of "the law," which differs substantially from the version of "the law" that is to be found in the other arena.

But the fact of the matter is, the arena of Nazario was constructed on a lie: a statement made repeatedly on the behalf of the defendants that Cunningham did not, nor does he have standing to, file complaints anywhere, with anyone, alleging that the rights of the handicapped described under IDEA and Section 504 are being violated. This statement was made on the behalf of the defendants despite the defendants and their lawyers and the judge in Nazario having in their possession volumes of documents regarding the complaints filed by Cunningham, including statements by the DOE that Cunningham has the right to file these complaints and that the defendants have an obligation to respond to them. Yet, the judge in Nazario chose to believe that Cunningham has no rights under either IDEA or Section 504. And regarding Cunningham's motion under Rule 60(b), when Cunningham began confronting the Nazario court with additional statements from the DOE that Cunningham does indeed have the right

to file complaints on the behalf of the handicapped under both IDEA and Section 504, the judge chose not to rule on admitting these documents as evidence of possible fraud committed by the defendants, nor to establish a discovery period in which further evidence of fraud could be gathered and presented to the court.

So now there are two arenas, with their own versions of "the law," a federal judge who has been asked to recuse himself, two separate court proceedings, Nazario and Riley, undertaken to accommodate the two different versions of "the law," and a third suit, Robert D. Cunningham Jr. v. Edward R. Becker and the Judicial Counsel of the Third Judicial Circuit, concerning the handling of complaints of judicial misconduct alleging that the judge in Nazario failed to respond in a timely manner to motions directing the District Court's attention to misrepresentations being made in the course of Nazario. In summary, these matters are in the throes of chaos.

CONCLUSION

It has been describe that one of the duties of the U.S. Supreme Court is to protect the courts from embarrassment (the Court's choice of wording). Because of the situation described above, the petition for a writ of certiorari should be granted.

STATUS OF RELATED CASES

In the related case of Robert D. Cunningham Jr. v. Richard W. Riley, Secretary, U.S. Department of Education, the U.S. District Court was notified of the contradictory nature of the opinions issued in Riley and Nazario. A motion for reargument was filed in Riley on May 24, 2000. At the time that this petition is going to press, no ruling on the reargument motion has been released.

In the related case of Robert D. Cunningham Jr. v. Edward R. Becker and the Judicial Council of the Third Circuit, which concerns the handling of judicial misconduct allegations that arose during the course of Nazario, the case is now pending before the Third Circuit Court of Appeals.

Respectfully submitted,

Robert D. Cunningham Jr., M.D.
Pro se Plaintiff
50 Greenway Square
Apartment M-31
Dover, DE 19904
(302)-736-0871

APPENDICES

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5523

Robert D. Cunningham Jr., M.D.,

Appellant

v.

CARMEN R. NAZARIO, Secretary Delaware Department of Health and Social Services; CHARLES KONIGSBERG

On Appeal From the United States District Court for District of Delaware
(D.C. Civ. No. 96-ev-00247)
District Judge:
Honorable Joseph J. Farnan, Jr.

Submitted For Possible Summary Action
Under Third Circuit LAR 27.4
and I.O.P. 10.6
June 29, 2000

Before: MCKEE, BARRY AND FUENTES,
Circuit Judges

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Delaware and was submitted for summary action under Third Circuit

APPENDIX A

LAR 27.4 and I.O.P. 10.6. On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered November 23, 1998, be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Acting Clerk

DATED: July 27, 2000

APS-190 UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Submitted For Possible Summary Action
Under Third Circuit LAR 27.4
and I.O.P. 10.6
June 29, 2000

Before: MCKEE, BARRY AND FUENTES,
Circuit Judges

OPINION

PER CURIAM

Robert D. Cunningham Jr., appeals from the District Court's order denying

his motion to recuse and motion pursuant to Fed.R.Civ.P. 60(b). Before us are Cunningham's motion to stay the appeal and the appellees' motion to affirm. For the following reasons, we shall deny the motion to stay and grant the motion to affirm.

I

Cunningham, a developmental pediatrician, was employed by the Child Development Watch Clinic ("Child Watch") in Milford, Delaware. In his complaint, he alleges that during his employment at Child Watch the staff and pediatricians incorrectly labeled mildly retarded children as either "developmentally delayed" or "learning disabled," a practice that continued after his employment at Child Watch terminated. According to Cunningham, this mislabeling violates various provisions of the United States Constitution, federal statutes, and federal regulations.

In April 1997, the District Court dismissed the complaint for lack of standing, finding that Cunningham had neither established actual or threatened injury to himself nor met the criteria for third party standing. Cunningham then filed various motions seeking reconsideration of the Court's order. The Court allowed Cunningham to file an amended complaint, but in 1997 granted the defendants' motion to dismiss. In addition to finding that most of Cunningham's claims failed for lack of standing, the Court also found that Cunningham's section 1983 claims either failed to state a claim or were barred

by the statute of limitations. Cunningham filed a motion for reargument which the Court denied by order entered September 21, 1997. On September 26, 1997, Cunningham filed a notice of appeal challenging the District Court's orders dismissing his complaint and denying his motion for reargument. During the pendency of the appeal, Cunningham filed a motion to recuse the District Court Judge. The District Court stayed the motion pending disposition of the appeal.

On March 16, 1998, this Court affirmed and on June 3, 1998, the Supreme Court denied Cunningham's petition for a writ of certiorari. On November 20, 1998, the District Court ruled on the pending motion to recuse as well a newly filed Rule 60(b) motion in which Cunningham reasserted the claims in his amended complaint and argued that the District Court's dismissal of that complaint was erroneous. The District Court denied the motion to recuse as both untimely and meritless and denied the Rule 60(b) motion because the Court lacked "jurisdiction to alter the mandate of the Third Circuit, where, as here, Plaintiff's [sic] has already appealed matters that form the basis of his Rule 60(b) motion." This appeal followed.

II

Cunningham asks us to stay the appeal pending the disposition of two related District Court cases which, he claims, will demonstrate that defense counsel fraudulently concealed information revealing that the Department of Education has determined that Cunningham has standing to file

administrative complaints under the IDEA.

Our ruling on a motion for stay turns on the following factors: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1986); Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d. Cir. 1991).

Here the first factor is dispositive. For substantially the same reasons given by the District Court, we find that the District Court did not err in denying Cunningham's motion to recuse and motion pursuant to Rule 60(b). We so find despite the allegations in Cunningham's motion to stay. Even if those allegations were true, and even if the alleged information could somehow become part of the record on appeal, it would be to no avail: a determination by the Department of Education that Cunningham has standing under the IDEA for certain purposes has no bearing on the District Court's determination, previously affirmed by us, that he lacks standing in this case. Accordingly, the motion for a stay is denied.

For the reasons stated above, the instant appeal does not present any substantial question. I.O.P. 10.6. We shall, therefore, grant the appellees' motion and affirm the District Court's judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.,
Plaintiff,

v.

CARMEN R. NAZARIO, SECRETARY
DELAWARE DEPARTMENT OF HEALTH
and SOCIAL SERVICES,
CHARLES KONIGSBERG
Defendants.

Civil Action No. 96-247-JJF

ORDER

At Wilmington this 20th day of November 1998, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1) Plaintiff's Motion for Reargument [FRCP 59(e)] (D.I. 133) is GRANTED.

2) Plaintiff's Motion to Recuse (D.I. 126) is DENIED.

3) Plaintiff's Motion Under Rule 60(b) For Relief From Decisions Entered August 29, 1997 And September 25, 1997 (D.I. 139) is DENIED.

4) All pending motions filed by either party in this action are denied as moot.

/s/ Joseph J. Farnan Jr.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.,
Plaintiff,

v.

CARMEN R. NAZARIO, SECRETARY
DELAWARE DEPARTMENT OF HEALTH
and SOCIAL SERVICES,
CHARLES KONIGSBERG
Defendants.

Civil Action No. 96-247-JJF

Robert D. Cunningham, Jr., M.D.
Pro Se Plaintiff

Marc P. Niedzielski, Esquire,
Deputy Attorney General, Department
of Justice, Wilmington, Delaware.
Attorney for Defendants.

MEMORANDUM OPINION

November 20, 1998
Wilmington, Delaware

/s/ Joseph J. Farnan Jr.
Farnan, Chief Judge

Presently before me is a Motion For Reargument [FRCP 59)e)] (D.I. 133) and a Motion Under Rule 60(b) For Relief From Decisions Entered August 29, 1997 And September 25, 1997 (D.I. 139), filed by Plaintiff, Robert D. Cunningham, Jr. Although Plaintiff's case is closed, Plaintiff filed the instant Motions asking me to reconsider my decision denying, as moot, Plaintiff's Motion To Recuse (D.I. 126), and to reconsider my August 29, 1997 and September 25, 1997 Orders. For the reasons set forth below, I will grant Plaintiff's Motion For Reargument, but deny Plaintiff's Motion To Recuse, and Plaintiff's Motion Under Rule 60(b).

BACKGROUND

On August 29, 1997, I issued a Memorandum Opinion and Order granting Defendants' Motion to Dismiss Plaintiff's Amended Complaint. (D.I. 107, 108). In so doing, I concluded that the claims raised by Plaintiff failed for lack of standing, expiration of the statute of limitations and failure to state a claim upon which relief may be granted. In addition, I issued a second Order on August 29, 1997, denying as moot a series of discovery and related motions filed by Plaintiff. (D.I. 109).

Shortly thereafter, Plaintiff filed a Motion For Reargument (D.I. 110), another series of discovery motions (D.I. 111, 112, 113), and a Motion To Extend Time For Filing Notice Of Appeal (D.I. 118). On September 25, 1997,

I issued two Orders (D.I. 121, 122) denying Plaintiff's Motion For Reargument, denying as moot his discovery motions, and denying his Motion To Extend Time.

The following day, Plaintiff filed a Notice of Appeal, appealing two of the Orders, the August 29, 1997 Order (D.I. 108) granting Defendants' Motion To Dismiss and the September 25, 1997 Order (D.I. 121) denying Plaintiff's Motion For Reargument and denying as moot Plaintiff's discovery motions. Although Plaintiff's case was no longer pending before me as a result of the appeal, Plaintiff filed a Motion To Recuse Under 28 U.S.C. 144 and 28 U.S.C. 455(a) (D.I. 147). Because of the pendency of the appeal, I issued an Order (D.I. 147) staying consideration of the Motion To Recuse.

Subsequently, the Court of Appeals for the Third Circuit affirmed the Orders Plaintiff had appealed and denied Plaintiff's request for a rehearing. Thereafter, the United States Supreme Court denied certiori. In light of the Court of Appeal's decision, I denied, as moot, Plaintiff's Motion To Recuse (D.I. 131). The instant Motions seeking reconsideration of the Motion to Recuse and relief from judgment under Rule 60(b) were then filed by Plaintiff.

DISCUSSION

I. Motion For Reargument

In the Motion For Reargument, filed pursuant to Federal Rule of Civil Procedure 59(e), Plaintiff asks that I reconsider my decision to deny, as

moot, Plaintiff's Motion To Recuse. In the Motion, Plaintiff states that he is contemplating filing a Motion Under Rule 60(b), and therefore, it is appropriate for me to consider the merits of the Motion To Recuse. Since the filing of the Motion For Reargument, Plaintiff has filed a Rule 60(b) Motion. Because the Rule 60(b) Motion is now pending before me, I will grant Plaintiff's Motion For Reargument so that I may decide Plaintiff's Motion To Recuse on the merits.

II. Motion To Recuse

In the Motion To Recuse (D.I. 126), Plaintiff requests that I recuse myself from adjudicating further matters in Plaintiff's case, pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a)[1]. Specifically, Plaintiff contends that I am personally biased against him and have lost my ability to be impartial. In support of the Motion, Plaintiff relies primarily on events that occurred on September 24, 1996, a subsequent encounter between Plaintiff and courthouse security personnel, and my rulings and method of handling certain motions in the case.

Initially, I believe a review of the statutes relied upon by Plaintiff will be helpful. In pertinent part, Section 144 provides:

---

[1] As plaintiff has fully briefed the Motion For Recusal, no additional briefing from Plaintiff is required. The Motion will be decided on the basis of the papers now before me.

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144.

Section 455 expresses the same basis of personal bias or prejudice as grounds for disqualification as Section 144, but Section 455 does not contain an express provision concerning timeliness. Although many courts, construing Section 144 and Section 455 in pari materia, have applied a timeliness requirement to Section 455, the Court of Appeals for the Third Circuit has declined to do so. See United States v. Antar, 53 F.3d 568, 572 (3d Cir. 1995) (recognizing that Section 455 contains no explicit timeliness provision). With these standards in mind, I will proceed to consider Plaintiff's Motion under each of the statutory provisions.

A. 28 U.S.C. § 144

Before proceeding to the merits of Plaintiff's Motion To Recuse under Section 144, as a threshold issue, I must determine whether the Motion is timely filed. In evaluating whether a motion is timely filed under Section 144, courts in this Circuit have

considered whether the movant has promptly filed the motion, affidavit and certificate of counsel once the facts forming the basis of the disqualification have become known and whether the movant has participated in substantial pretrial motions between the time he or she first learned of the asserted bias and the time he or she filed documents in support of recusal. See United States v. Boffa, 513 F. Supp. 505, 509 (D. Del. 1981) (collecting cases). In this case, Plaintiff's Motion To Recuse was filed on October 6, 1997, more than 30 days after the dismissal of this lawsuit and after an appeal had been noticed. Generally, motions to recuse filed after dismissal of a case are considered untimely. See e.g. Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984) (holding that recusal motion filed 12 days after dismissal is untimely). In addition, the Motion in this case is based, in part, on incidents occurring as early as September 1996, yet Plaintiff waited over a year to assert any claim of bias based on the 1996 events. Moreover, as the docket indicates, Plaintiff filed a substantial number of pretrial motions between the time he first learned of the alleged bias and the time he filed the instant Motion. Indeed, between September 1996 and the filing of the Motion To Recuse, Plaintiff filed in excess of fifteen motions. Based on Plaintiff's substantial delay in filing the Motion To Recuse and his substantial participation in motion practice prior to his filing of the recusal Motion, I conclude that Plaintiff's Motion To Recuse is untimely under Section 144.

Accordingly, Plaintiff's Motion under Section 144 will be denied, because it was not filed in a reasonable amount of time from when Plaintiff became aware of the alleged acts that might support such a motion. However, because Section 455 does not contain a timeliness provision, I will address the merits of Plaintiff's Motion under the standards of Section 455.

B. 28 U.S.C. § 455(a)

Following the dictates of Section 455(a), a judge should be disqualified if a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality. See Krell v. Prudential Insurance Company of America, 148 F.3d 283 (3d Cir. 1998). However, absent such a showing, a judge has an affirmative duty not to recuse himself or herself from a case. Greater New York Mutual Ins. Co. v. North River Ins. Co., 1995 WL 214410, *1 (E.D. Pa. 1995).

After considering the allegations made by the Plaintiff and the actual record of the events relied upon by Plaintiff, I conclude that a reasonable person would not harbor doubts regarding my impartiality in handling this case. First, Plaintiff alleges that I engaged in an ex parte discussion with Defendants' counsel regarding matters pending before me in this case. Pursuant to an Order dated September 9, 1996, the Court held a hearing on September 24, 1996. As stated in the Order, the purpose of the hearing was for Defendants' counsel to show cause why she failed to appear for the August

28, 1996 Rule 16 scheduling conference. During the hearing, I admonished Defendants' counsel for her lack of attention to Plaintiff's phone calls and correspondence. (Tr. of 9/24/96 Hearing at 31). In essence, I informed Defendants' counsel that her conduct in failing to respond to Plaintiff and failing to appear for the Rule 16 Scheduling Conference demonstrated a lack of training and experience and inquired as to the level of training and supervision she was provided by her employer, the Delaware Department of Justice. (Tr. of 9/24/96 Hearing 13-17, 24). The purpose of my exchange with Defendants' counsel was in the context of determining whether counsel should be sanctioned for failing to appear at the Rule 16 Conference.

Plaintiff, a licensed medical doctor, was present and participated in the presentation of his position. Although appearing pro se, the record in this case demonstrates that Plaintiff fully understands the issues he asserts and possesses substantial knowledge as to the processes a litigant must adhere to in presenting issues and claims before a court. As the September 24 Hearing drew to a close, I was not confident that Defendants' counsel satisfactorily understood the significance of my comments concerning the need for less experienced attorneys to develop the necessary litigation and courtroom skills to meet the minimum requirements expected of counsel. In an effort to reinforce my remarks about counsel's lack of necessary skills, I asked Plaintiff if he objected to me further instructing counsel regarding

the need for her and other attorneys in the Justice Department to obtain training to develop litigation skills. (Tr. of 9/24/96 Hearing at 33). I assured Plaintiff that there would be no conversation regarding the issues in the instant case, and Plaintiff twice indicated that he understood and had no objection. (Tr. of 9/24/96 Hearing at 33). After the Hearing, I and my law clerks talked with Defendants' counsel about how and where appropriate litigation training might be obtained. In sum, the transcript of the September 24 Hearing is explicit regarding my concern about Defendants' counsel's failure to respond to Plaintiff and the Court, and her failure to demonstrate a minimum level of acceptable skill and experience as a trial attorney. Accordingly, on the record discussed, a reasonable person, reviewing the September 24 Hearing transcript and my dialogue with Defendants' counsel, would not have any doubts about my impartiality being tainted by a bias in favor of Defendants or their counsel.

Further, Plaintiff's contention that the Court discussed a scheduling stay with Defendants' counsel lacks any factual support and is based purely on opinion and conjecture. Such conclusory statements and opinions cannot be credited and are contradicted by the record, and therefore, must be disregarded. See United States v. Vespe, 868 F.2d 1328, 1340 (3d Cir. 1989) (refusing to credit conclusory statements or opinions in adjudicating motion for recusal).

To the extent Plaintiff bases his Motion on his encounter with security

officers, I likewise find it is without merit and based on mere speculation. Without any factual support, Plaintiff contends that his encounter with the Court's security staff in a courtroom hallway demonstrates that I am biased against him. On the record presented by Plaintiff regarding this assertion, I conclude that a reasonable person would not find this incident to be indicative of any loss of impartiality.

Lastly, to the extent that Plaintiff bases his claim of bias and prejudice on rulings that did not accept his arguments, I conclude that such allegations fail to state a basis for recusal. "Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," because such decisions can be properly reviewed on appeal. Liteky v. United States, 510 U.S. 540, 555 (1994), United States v. Bertoli, 40 F.3d 1384, 1413 (3d Cir. 1994). Indeed, even a judge's consistent pattern of ruling against a party may be entirely justified where that party consistently takes positions which are unsupportable. Massachusetts School of Law at Andover, Inc. v. American Bar Association, 107 F.3d 1026, 1043 (3d Cir. 1997).

In this case, Plaintiff appealed the unfavorable rulings which he complains stem from my bias against him, and the Third Circuit has affirmed the decisions. Because the Third Circuit has concluded that Plaintiff's positions are legally unsupportable by its affirmance of the Orders I entered, I conclude that the rulings unfavorable to Plaintiff are a result of the correct application of legal principles, and

not a result of any bias or prejudice against Plaintiff. Accordingly, I will deny Plaintiff's Motion To Recuse under Section 455.

III. Rule 60(b) Motion

In his Rule 60(b) Motion, Plaintiff essentially reasserts his claims and contends that the Court erred in the legal rulings rendered in its Memorandum Opinion and Order dated August 29, 1997 (D.I. 107, 108). It is well-established that a Rule 60(b) motion may not be used as a substitute for appeal, and therefore, legal error is insufficient grounds for granting a Rule 60(b) motion. See Smith v. Evans, 853 F.2d 155, 158 (3d Cir. 1988).

Moreover, as stated above, Plaintiff has already appealed Court's decision to the Third Circuit, and the Third Circuit has affirmed this Court's decisions. In addition, Plaintiff moved for a rehearing in the Third Circuit and for a writ of certiori before the United States Supreme Court, both of which were denied.

As the district court stated in Seese v. Volkswagenwerk, A.G., "The fact of the matter is that this litigation is over. It is final. It has gone through District Court, Third Circuit, rehearings, cert. petitions to the Supreme Court of the United States, cert. denied." 679 F.2d 336, 337 (3d Cir. 1982) (citing district court's comments at Rule 60(b) hearing). Agreeing with the district court's analysis, the Third Circuit held that "the district court is without jurisdiction to alter the mandate of

this court on the basis of matters included or includable in defendants' prior appeal." Id. (affirming district court's decision to deny consideration of Rule 60(b) motion).

Like the district court in Seese, this Court has no jurisdiction to alter the mandate of the Third Circuit, where, as here, Plaintiff has already appealed the matters that form the basis of his Rule 60(b) motion. Accordingly, because Plaintiff's Rule 60(b) Motion rests on matters included or includable in Plaintiff's previous appeal, the Court will deny Plaintiff's Motion.

CONCLUSION

For the reasons discussed, Plaintiff's Motion For Reargument [FRCP 59(e)] will be granted and his Motion to Recuse, having been reconsidered, will be denied. In addition, Plaintiff's Motion Under Rule 60(b) For Relief From Decisions Entered August 29, 1997 And September 25, 1997 will be denied. Further, all pending motions filed by either party in this action will be denied as moot.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.
Plaintiff,

v.

CARMEN R. NAZARIO, SECRETARY
DELAWARE DEPARTMENT OF HEALTH
and SOCIAL SERVICES,
CHARLES KONIGSBERG
Defendants.

Civil Action No. 96-247-JJF
Filed: August 29, 3:38 PM 1997
Clerk, U.S. District Court
District of Delaware

ORDER

At Wilmington this 29 day of August 1997, for the reason set forth in the Memorandum Opinion to be issued this date;

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion To Admit Amended Complaint (D.I. 85) is GRANTED

2. Plaintiff's Motion to Amend Reargument (D.I. 86) is GRANTED.

3. Plaintiff's requests for reargument (D.I. 81, 91) are DENIED.

4. Plaintiff's Motion For Relief From Judgment Or Order; Motion For Sanctions (D.I. 90) is DENIED.

APPENDIX C

5. Defendants' Motion to Dismiss Plaintiff's Amended Complaint (D.I. 8) is GRANTED.

/s/ Joseph J. Farnan Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.
Plaintiff

v.

CARMEN R. NAZARIO, SECRETARY
DELAWARE DEPARTMENT OF HEALTH
and SOCIAL SERVICES,
CHARLES KONIGSBERG
Defendants.

Civil Action No. 96-247-JJF

Robert D. Cunningham Pro Se Plaintiff.

Wendy A. Rising, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorney for Defendants.

MEMORANDUM OPINION

August 29, 1997
Wilmington, Delaware

Filed August 29, 3:39 PM, 1997
Clerk U.S. District Court
District of Delaware

/s/ Joseph J. Farnan Jr.
Farnan, Chief Judge

Presently before the Court are numerous related motions and requests for reargument, reconsideration, and relief from judgment filed by Plaintiff, Robert Cunningham, Jr., in this civil rights action against Defendants, the Delaware Department of Health and Human Services and various state officials. On March 31, 1997 the Court issued an Order (D.I. 78) granting Defendants' Motion to Dismiss Plaintiff's Complaint. On April 4, 1997, the Court issued a Memorandum Opinion (D.I. 79) explaining its reasons for the previously entered Order. In accord with the Memorandum Opinion and Order, Plaintiff's case was closed.

On April 4, 1997, the Court received a letter from Plaintiff suggesting that the Court made "an inadvertent judicial error" in its March 31, 1997 Order. (D.I. 80). Upon receipt of this letter, the Court informed the parties that it would treat Plaintiff's letter as a Motion for Reargument of the Court's March 31, 1997 Order pursuant to Local Rule 7.1.5. (D.I. 81). Thereafter, Plaintiff filed three more documents directly related to the reargument, a Motion To Amend Motion For Reargument (D.I. 86), and a Supplementary Motion for Reargument (D.I. 91).[1] Without waiting for the Court to rule on his pending motion for reargument, Plaintiff

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[1]Plaintiff has also filed discovery motions and numerous letters reiterating his position with the Court.

also filed a Motion for Relief from Judgment or Order; Motion for Sanctions (D.I. 90), in which Plaintiff reiterates a number of the arguments set forth in his reargument papers. In an effort to untangle the procedural quagmire in this case and to frame the issues that would be considered in the reargument/relief from judgment context, the Court informed the parties by letter, that it would consider Defendants' Motion to Dismiss in opposition to the Amended Complaint. (D.I. 93).

For the reasons set forth below, the Court concludes that the claims raised by the Plaintiff's Amended Complaint fail for lack of standing, expiration of the statute of limitations and failure to state a claim upon which relief may be granted. Therefore, the Court will deny Plaintiff's requests for reargument and Motion for Relief from Judgment and will grant Defendants' Motion to Dismiss Plaintiff's Amended Complaint.[2]

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[2]Following the Court's prior dismissal of Plaintiff's Complaint, Plaintiff's filings indicate that he was unclear as to the status of various motions that the Court dismissed as moot. In order to prevent that confusion, the Court here notes that upon dismissal of the Amended Complaint, Plaintiff's case in the District Court will be closed. Because this dismissal is a final order, Plaintiff is, of course, free to file an appeal with the United States Court of Appeals

BACKGROUND

On May 14, 1996, Plaintiff filed a Complaint (D.I. 1) against DHHS and Secretary Carmen Nazario, seeking a preliminary injunction to correct the alleged mislabeling of handicapped children by the Child Development Watch Clinic ("Child Watch"), a state agency run by DHSS. On July 2, 1996, Plaintiff filed an Amended Complaint (D.I. 16). In addition to providing more factual background, Plaintiff's Amended Complaint (1) names Charles Konigsberg, director of Public Health, as an additional defendant; (2) adds a cause of action under Section 504 of the Rehabilitation Act of 1973; and (3) seeks $600,000 in damages from Defendants Konigsberg and Nazario for Plaintiff's alleged loss of ability to obtain employment in Delaware and for the anguish Plaintiff suffered in attempting to preserve his rights and the rights of children with disabilities and their families. Because the Court informed the parties that it will rely on the Amended Complaint in the context of the instant motions, the Court derives its factual background entirely from the Amended Complaint.

From July 1988 through June 1989, Plaintiff, a developmental pediatrician, was employed at the Child Watch Clinic in Milford, Delaware. During his employment, Plaintiff claims the staff and pediatricians incorrectly labeled children with cerebral palsy, autism,

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for the Third Circuit, if he disagrees with Court's decision.

or mental retardation with the such general terms as "developmentally delayed" or "learning disabled," rather than with the most specific diagnosis available.

As a result of this alleged mislabeling, Plaintiff claims that the staff pediatricians at Child Watch could be subjected to malpractice actions for failure to properly diagnose or wrongful birth actions in cases where genetic testing could have been performed to detect hereditary mental retardation. In addition, Plaintiff raises concerns about the adverse affects that this mislabeling practice could have on the families and children involved. In an effort to bring this practice to the attention of the proper personnel, Plaintiff alleges that he filed a protest letter. However, Plaintiff contends his letter was ignored. In March, 1989, Plaintiff submitted a letter of resignation, stating his intent to resign at the end of April, 1989. Prior to his resignation, however, Plaintiff alleges that he was injured in an on the job accident. Following the accident, Plaintiff returned to work on a part-time basis, but resigned permanently in June 1989.

Beginning in July 1989, Plaintiff began to receive worker's compensation payments. Plaintiff alleges that he sought re-employment with Child Watch on two separate occasions, once in July 1993 and once in June 1994. However, Plaintiff alleges that he was denied re-employment, because of his position on the mislabeling practice. Plaintiff further alleges that he drafted a complaint, outlining his attempts to return

to employment and his allegations that Child Watch was operating outside of existing laws, and submitted the complaint to the state government and the United States Department of Education.

On the state level, Plaintiff's complaint was referred to the Merit Employee Relations Board (the "Board"). After reviewing the complaint, the Board made a number of findings of fact and ultimately dismissed the complaint as untimely. Plaintiff appealed, and the Board's decision was upheld by the Delaware Superior Court and the Delaware Supreme Court.

On the federal level, Plaintiff alleges that the U.S. Department of Education instructed the state government to resolve the complaint within a sixty day time period. However, Plaintiff alleges that the state government refused to meet with him. Thereafter, Plaintiff alleges that the Department of Education informed him by letter that it did not have jurisdiction over Plaintiff's complaints, but that Plaintiff could pursue his claims in a court of law.

Subsequently, Plaintiff filed the instant action, alleging that the mislabeling practice that occurs at Child Watch results in a number of constitutional and statutory violations. First, Plaintiff alleges that the mislabeling practice violates the First Amendment. In this regard, Plaintiff argues that the free speech rights of the staff at Child Watch are violated, because the State maintains a "de facto policy" of forbidding the disclosure of precise diagnoses. In addition, Plaintiff claims that his own free speech

rights were violated when he was asked to withhold diagnostic information from families. Second, Plaintiff alleges that the mislabeling violates the privacy rights of families that utilize Child Watch by preventing them from obtaining appropriate education regarding their children's disabilities, appropriate services and support groups to help them cope with the disabilities, and the funds allocated for mentally retarded individuals through Supplemental Social Security Income.

Additionally, Plaintiff claims that because of its mislabeling practice, Child Watch violates the following six statutes: (1) 34 CFR § 303.404, which requires Child Watch to obtain written parental consent prior to initiating early prevention services, (2) 34 CFR § 303.322, which requires Child Watch to perform multi-disciplinary evaluations by qualified personnel; (3) 34 CFR § 303.521, which prohibits Child Watch from charging fees for evaluations and assessments performed; (4) 34 CFR § 303.344, which requires Child Watch to develop an individualized family plan identifying the child's risk factor or diagnosis and revealing the same to the family; (5) 34 CFR § 303.512, which requires the State to implement a grievance system for alleged violation of the Act; and (6) 34 CFR § 303.321, which requires the State to establish a comprehensive Child Find Program to identify, locate, and evaluate children eligible for services.

Lastly, Plaintiff claims that the alleged mislabeling results in violations of Section 504 of the Rehabilitation Act of 1973. According to Plaintiff,

the mislabeling of children and the withholding of the correct diagnoses results in discrimination against the handicapped, because it misleads families away from government-funded education, social and medical services. Further, Plaintiff alleges that he was discriminated against when he allegedly refused to abide by the State's discriminatory policy of mislabeling.

As relief for the above mentioned violations, Plaintiff asks the Court to order (1) Child Watch to immediately cease from withholding diagnostic information, (2) an audit and survey of Child Watch's patient files by an examiner with expertise in developmental pediatrics and a correction of the mislabeling that the examiner finds; (3) the State to purchase a conspicuous advertisement in the state newspapers apologizing to handicapped individuals for withholding information from them, (4) the State to establish a hotline for those who fear they had information withheld from them by Child Watch, and (5) the State to hire a physician with experience in childhood developmental disabilities to supervise and provide care in the Child Watch clinics. In addition, Plaintiff demands repayment of all his legal costs and damages in the amount of $600,000 against Defendants Konigsberg and Nazario, individually, for his loss of employment and for the anguish he endured in bringing his claims.

DISCUSSION

In discerning Plaintiff's grounds for reargument, the Court will rely

on Plaintiff's letter suggesting "inadvertent judicial error," his Motion to Admit Amended Complaint, his Motion To Amend Motion for Reargument and his Supplementary Motion For Reargument (collectively, the "Reargument Papers"). In the Reargument Papers, Plaintiff essentially sets forth three grounds for reargument.[3] First, Plaintiff claims that he has both individual and third party standing to sue, based on his failed attempts to obtain

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[3] In his Reargument Papers and Motion For Relief from Judgment Or Order, Plaintiff alleges that his Amended Complaint should be considered, because under Rule 15(a), Plaintiff should have been permitted to amend his pleadings once as a matter of course before a responsive pleading was served. In their Motion to Dismiss, the State Defendants state that "[b]ecause the Motion [requesting immediate closure of all Child Watch clinics] in essence amends the remedy sought in the complaint, and both the complaint and the motion are based upon the same allegedly unconstitutional practices, Plaintiff's motion is treated as an amendment to his complaint." (D.I. 8 at 1). Rather than debate whether Plaintiff had in fact amended once as a matter of course by filing his motion, and was therefore, required to seek leave of Court to amend, the Court will accept Plaintiff's Amended Complaint for purposes of the reargument proceedings. Therefore any alleged legal error caused by the Court's prior decision to strike the Amended Complaint has been avoided.

re-employment with the clinic and on his physician-patient relationship, respectively. Second, Plaintiff claims that the Court erred in denying his discovery requests, because discovery could assist him in establishing standing. Third, Plaintiff alleges that the Court should not have dismissed his Motion For Relief from Fraud as moot, and should have allowed Plaintiff the opportunity to conduct discovery on the alleged fraud.

In his Motion for Relief from Judgment or Order, Plaintiff asks this Court for relief pursuant to Federal Rule of Civil Procedure 60(b). In support of the requested relief, Plaintiff essentially reiterates his argument that the State Defendants committed fraud.

In response to these arguments[4], the State Defendants contend that Plaintiff's Amended Complaint fails to cure his lack of standing, and that

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For this reason, Plaintiff's Motion to Admit Amended Complaint (D.I. 85) will be granted.

[4]While the State Defendants have not filed any formal response briefing to Plaintiff's Reargument Papers and Motion For Relief From Judgment Or Order, the Court indicated to the parties that it would consider Defendants' Motion To Dismiss (D.I. 8) as against Plaintiff's Amended Complaint. Because the Defendant's Reply Brief In Support Of Motion To Dismiss (D.I. 50) was part of the briefing sequence that commenced with the Motion to Dismiss, the Court

discovery on the matter will not assist in curing the defect in standing. Defendants further contend that Plaintiff's claims are barred by the statute of limitations and that Plaintiff's assertions of fraud and misconduct are baseless.

I. Standing

In order for a federal court to consider the legal merits of a claim, the plaintiff must establish, as a threshold matter, that he or she has standing to sue. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). In order to establish standing, Plaintiff must satisfy three requirements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted). First, Plaintiff must have suffered "an injury in fact." Id. An injury in fact requires an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not merely conjectural or hypothetical. Second, Plaintiff must establish a causal connection between

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will consider the arguments contained in that document, as well. Lastly, in a letter dated April 17, 1997 (D.I. 88), the State Defendants responded to some of the arguments raised by Plaintiff and indicated that they wished to rely on the arguments set forth in their Opposition To Plaintiff's Motion For Relief From Fraud And Misconduct (D.I. 54). Therefore, the Court will also consider the arguments raised in these documents.

the injury and the conduct that is the subject of Plaintiff's complaint. In other words, the injury must be "fairly traceable to the challenged action to the defendant and not the result of the independent action of a third party who is not before the court." Id. Third, Plaintiff must show that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id. Where, as here, standing is challenged on the basis of the pleadings, the Court will accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. See Pennell v. San Jose, 485 U.S. 1, 7 (1988) (citations omitted).[5]

In this case, the Court concludes that Plaintiff lacks standing to pursue the free speech, privacy, IDEA and Rehabilitation Act claims that he asserts on behalf of disabled children and families affected by the alleged mislabeling. Specifically, the Court concludes that Plaintiff has not satisfied the injury in fact requirement for standing. It is a basic premise of constitutional law, that Plaintiff,

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[5]In his Reargument Papers, Plaintiff argues that discovery will assist him in establishing standing, because it will show that he was actively seeking re-employment at Child Watch and that he was denied re-employment because of his position on the labeling of handicapped children. Because the Court is accepting Plaintiff's allegations as true, Plaintiff's requests for discovery are denied as moot.

himself, must have suffered the injury he seeks to redress. Here, Plaintiff seeks to redress alleged injuries to the privacy and free speech rights of third parties. Ordinarily, one may not claim standing to vindicate the constitutional rights of a third party. Powers v. Ohio, 499 U.S. 400 (1991). Therefore, under the general rule, the Court concludes that Plaintiff lacks standing to bring the instant claims on behalf of third parties.

However, there is an exception to the general principle that has become known as "third-party standing." The Supreme Court has recognized that litigants have the right to bring actions on behalf of third parties, if three criteria are met. See Powers, 499 U.S. at 413-14; Singleton v. Wulff, 428 U.S. 106, 114-15 (1976); Amato v. Wilentz, 952 F.2d 742, 747-50 (3d Cir. 1991). First the litigant must have suffered an injury in fact, which gives him or her a sufficiently concrete interest in the outcome of the dispute. Second, the litigant must have a close relation to the third party. And, third, there must exist some hindrance to the third party's ability to protect his or her own interests.

In this case, Plaintiff argues that because he has the "right to seek re-employment as a developmental pediatrician" he has the right to assert the rights of "his prospective patients." (D.I. 86). In support of this proposition, Plaintiff cites those cases in which doctors have been found to have standing to raise the rights of their female patients, in challenging statutes that restrict abortions. How-

ever, a fundamental difference between these cases and the instant case, is that in the doctor-patient cases, the doctors were employed as physicians and, as such, maintained current doctor-patient relationships, which establish the basis for the "close relationship" requirements of third party standing. See e.g. Planned Parenthood Assn. v. Miller, 934 F.2d 1462, 1465 (11th Cir. 1991) (holding that physician has standing to challenge parental notification provision on behalf of his minor patients). In this case, Plaintiff is no longer employed as a pediatrician at Child Watch. Indeed, Plaintiff voluntarily resigned from Child Watch and has been collecting worker's compensation. As such, Plaintiff is not currently practicing medicine and maintains no current doctor-patient relationships with the children and families who utilize Child Watch. Moreover, that Plaintiff may have been seeking re-employment and may have been denied re-employment because of his views about the labeling of handicapped children, does not assist him in establishing doctor-patient relationships with the children and families whom he sought to serve. The doctrine of third party standing is applied hesitantly, and the Court declines to expand the doctrine to embrace the hypothetical, "potential patients," of a doctor who is not currently practicing medicine and who maintains no current doctor-patient relationships. See Singleton v. Wulff, 428 U.S. 106, 113 (1976) (recognizing that courts proceed hesitantly when third party rights are asserted), Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277

(1984) (expressing concern over judicial expansion of third party standing). For these reasons, the Court concludes that Plaintiff has failed to establish standing to pursue the free speech, privacy, IDEA and Rehabilitation Act claims that he raises on behalf of disabled children and their families.

With regard to Plaintiff's Section 1983 claims that the State Defendants violated his First and Fourteenth Amendment rights, the issue of Plaintiff's standing is more complex. While the State Defendants argue that Plaintiff has not suffered an economic injury, because he voluntarily resigned and was collecting worker's compensation, the Court is not persuaded by this argument. If Plaintiff was denied a protected property interest when he was not re-hired, then arguably, Plaintiff would have suffered an injury sufficient to establish standing. However, an inquiry into whether Plaintiff had a legally protected property interest in being re-hired, for example, would require the Court to blend the concept of standing with a decision on the merits, and the court declines to engage in that tortured analysis.

In cases such as this, where complex standing issues are raised and demonstration of the claimed injury would be inseparable from the merits, courts have avoided the standing issue and have examined the justiciability of the claims on other grounds. See 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3531.15 (1984), Elkin v. Fauver, 969 F.2d 48, 52 & n.1 (3d Cir. 1992) (avoiding full examination

of standing requirements and proceeding to merits of claim); Coker v. Sullivan, 902 F.2d 84, 87-88 (D.C. Cir. 1990) (stressing propriety of avoiding complex standing issues where case is more simply resolved on another basis); In re Merrill Lynch Relocation Management, Inc., 812 F.2d 1116 (9th Cir. 1987) (avoiding standing issue where argument is readily disposed of on the merits); New England MultiUnit Housing Laundry Assn. v. Rhode Island Housing & Mort. Fin. Corp., 893 F. Supp. 1180, 1191 & n. 14 (D.R.I. 1995) (declining "Defendant's invitation to decide the thorny issue of whether Plaintiffs have standing to sue" and disposing of case on other grounds). Therefore, in accord with this line of jurisprudence, the Court will assume that Plaintiff has standing to assert his claims that the State Defendants violated his First and Fourteenth Amendment rights, and will examine these claims in light of the other grounds that the State Defendants raise for dismissal.[6]

II. Failure To State A Claim

Although the State Defendants argue that Plaintiff's Fourteenth Amendment claims should be dismissed for lack

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[6]Again, with regard to these claims, Plaintiff's request for discovery to assist him to establish standing will be denied as moot, because the Court will assume, without deciding, that Plaintiff does have standing to maintain these claims.

of standing, the Court believes that the State Defendant's argument is more properly characterized as seeking dismissal on the ground that Plaintiff has failed to state a claim. Although Plaintiff's claim does not articulate expressly whether his failure to re-hire claim is based upon Equal Protection or Due Process, the Court concludes that under either analysis Plaintiff has failed to state a claim for which relief can be granted. See Fed. R. Civ. P. 12(b) (6).

In order to state a claim under the Equal Protection Clause of the Fourteenth Amendment, the Plaintiff is required to allege that he was discriminated against on the basis of his membership in a protected class. In this case, Plaintiff has not alleged that his failure to be re-hired was based on any illegal or discriminatory reasons. Moreover, Plaintiff has not alleged that he is a member of any protected class, or that he was treated differently from others similarly situated on a constitutionally protected basis. See Nelson v. Payne, 827 F. Supp. 1273, 1275-76 (S.D. Tex. 1992) (holding that Plaintiff failed to establish that school's decision not to re-hire him violated the Fourteenth Amendment, where Plaintiff failed to allege discrimination on basis of membership in protected class), aff'd, 18 F.3d 935 (5th Cir. 1994). At most, Plaintiff has alleged that he was not re-hired because of his differing views on the labeling of handicapped children. Because such differences of opinion are neither illegal nor discriminatory, Plaintiff has failed to establish an Equal Protection

claim.[7]

Likewise, Plaintiff has also failed to establish a claim under the Due Process Clause, because he has failed to allege that he was deprived of a legally protected property interest. As the Supreme Court stated in Roth v. Board of Regents, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." 408 U.S. 564, 577 (1972). Such a legitimate claim of entitlement may be created by "existing rules or understandings that stem from an independent source such as state laws." Id. In this case,

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[7] In his Amended Complaint, Plaintiff states, "In essence, the Plaintiff was discriminated against when he refused directions provided by the state government that were discriminatory against the handicapped. . ." To the extent that Plaintiff's Amended Complaint can be construed to state a claim under the Rehabilitation Act or the Equal Protection Clause on the basis of discrimination against the handicapped, the Court rejects the Plaintiff's claim. Even if Plaintiff was denied employment because of his views regarding the handicapped, he was not denied employment because he was handicapped. As such, Plaintiff has failed to state a claim that he was discriminated against in violation of either the Equal Protection Clause or the Rehabilitation Act.

Plaintiff does not allege any statutory entitlement to the position he sought, nor does he allege that there was an understanding between himself and the State Defendants that he would, in fact, be re-hired. Because Plaintiff has failed to allege that he was deprived of a legally protected property interest, Plaintiff has failed to establish a claim under the Fourteenth Amendment.

III. Statute of Limitations

Plaintiff's remaining Section 1983 claim is based upon the First Amendment. In stating his claim under the First Amendment, Plaintiff alleges that during his employment at Child Watch, the State Defendants violated his freedom of speech by requiring him to withhold diagnostic information from patients. Assuming arguendo, the Plaintiff has standing to pursue this claim, the Court must dismiss Plaintiff's claim on the ground that the applicable statute of limitations for the claim has expired.

In Wilson v. Garcia, the United States Supreme Court held that, for purposes of determining the applicable state statute of limitations, Section 1983 claims should be characterized as personal injury claims. 471 U.S. 261 (1985). In Delaware, the applicable statute of limitations for personal injury actions is two years. 10 Del. C. § 8119. Therefore, Plaintiff's Section 1983 claim based upon the First Amendment is subject to a two year limitations period.

In this case, the latest possible date of the alleged violations of Plaintiff's First Amendment rights by the

State Defendants would have been June 30, 1989, the last day of Plaintiff's employment with the State. Under the applicable statute of limitations, Plaintiff should have filed the instant claim that his First Amendment rights were violated, no later than June 30, 1991. Because Plaintiff filed the instant action almost five years later, on May 14, 1996, Plaintiff's First Amendment claim is time-barred.

In an effort to overcome the statute of limitations, Plaintiff raises two arguments for tolling. (D.I. 18). First, Plaintiff raises the continuing wrong doctrine. However, Plaintiff's Amended Complaint does not allege that the State Defendants have continued to impede his speech, and therefore, the Court concludes that this doctrine is inapplicable to his claim.

Second, Plaintiff raises the argument that the statute of limitations was tolled during Plaintiff's pursuit of administrative remedies under 20 U.S.C. § 1400. In support of his argument, Plaintiff relies on the Tenth Circuit's opinion in Association For Community Living in Colorado v. Romer, 992 F.2d 1040 (10th Cir. 1993). While the Tenth Circuit recognized that "a plaintiff must exhaust administrative remedies before bringing a 42 U.S.C. § 1983 action for relief that is also available under the IDEA," this rationale is inapplicable to Plaintiff's First Amendment claim. Id. at 1044. The purpose of the IDEA is to ensure that all handicapped children have available to them. . .a free appropriate public education which emphasizes special education and related services designed

to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate the handicapped children." 20 U.S.C. § 1400(c). Redressing alleged violations of the First Amendment rights of an individual who lacks standing to raise a claim under the IDEA in the first place, is simply not within the purview of the statute. Therefore, the Court rejects Plaintiff's tolling argument, and concludes that Plaintiff's First Amendment claim is time-barred.

IV. Fraud

In his Reargument Papers and Motion For Relief From Judgment or Order, Plaintiff argues that the Court should consider the allegations of fraud and misconduct that he advanced in his previously filed Motion For Relief From Fraud And Misconduct. (D.I. 53). In these documents, Plaintiff alleges, among other things, that the State Defendants committed fraud by mischaracterizing facts and legal arguments.

Under Rule 60(b), the determination to grant or deny relief is within the sound discretion of the trial court. See 12 Moore's Federal Practice § 60.22 (3d ed. 1997); Laskey v. Continental Products Corp., 804 F.2d 250 (3d Cir. 1986). In this case, the Court has reviewed the documents submitted by the State Defendants and finds the representations contained therein to be within the bounds of zealous advocacy

and neither fraudulent nor intentionally misleading. Therefore, the Court will deny Plaintiff's allegations of fraud. Accordingly, the Court will deny Plaintiff's request for reargument, and Motion For Relief From Judgment, Motion For Sanctions to the extent that they raise the issue of fraud.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion To Admit Amended Complaint (D.I. 85) and Motion To Amend Reargument (D.I. 86) will be granted, and Plaintiff's requests for reargument (D.I. 81, 91) and Motion For Relief From Judgment Or Order; Motion For Sanctions (D.I. 90) will be denied. Accordingly, the State Defendants' Motion To Dismiss Plaintiff's Amended Complaint (D.I. 8) will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR.,
Plaintiff,

v.

RICHARD W. RILEY, Secretary,
United States Department of
Education,
Defendant.

Civil Action No. 99-460-SLR

ORDER

At Wilmington this 16th day of May, 2000, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that defendant Richard W. Riley, Secretary, Department of Education's motion to dismiss (D.I. 15) is granted.

/s/ Sue L. Robinson
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR.,
Plaintiff,

v.

RICHARD W. RILEY, Secretary,
United States Department of
Education,
Defendant.

Civil Action No. 99-460 SLR

Robert D. Cunningham, Jr., M.D.,
pro se.

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D.C.

MEMORANDUM OPINION

Dated: May 16, 2000
Wilmington, Delaware

/s/ Sue L. Robinson
Robinson, District Judge

I. INTRODUCTION

Plaintiff Robert D. Cunningham, Jr. filed this action on July 20, 1999 against defendant Richard W. Riley, Secretary, United States Department of Education, alleging violations of his Fifth Amendment due process rights. (D.I. 1 & 2) Plaintiff's allegations arise out of the Department of Education's Office of Civil Rights' ("OCR") actions with respect to allegations of discrimination in violation of § 504 of the Rehabilitation Act of 1973 ("the Rehabilitation Act"), 29 U.S.C. § 794, on the part of the Delaware Division of Public Health ("DDPH"). (D.I. 1, 2, & 14) Plaintiff seeks injunctive relief; specifically, he is asking this court to order OCR to address in a "clear and explicit response" his allegations of discrimination. (D.I. 1, 2, & 14)

Currently before the court is defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). (D.I. 15) For the following reasons, defendant's motion shall be granted.

II. BACKGROUND

This case has a convoluted factual background, which the court will refrain

from paraphrasing in any detail.[1] Suffice to say, plaintiff on or about February 23, 1994 filed a complaint with the Department of Justice, alleging numerous violations of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., by his ex-employer DDPH. His complaint centered on DDPH's alleged policy of withholding diagnostic information from the families of disabled children. Five years earlier, in 1989, plaintiff had resigned his employment with the Delaware Child Development Watch Program, a component of DDPH, in part because of a dispute over this alleged policy. Between the time of his resignation and the filing of his complaint with the Department of Justice, plaintiff had complained about this policy to numerous State agencies and administrators.

Determining that it lacked jurisdiction over plaintiff's complaint, the Department of Justice on June 8, 1992 forwarded the complaint to the Department of Health and Human Services' Office for Civil Rights. This office subsequently determined that it too lacked jurisdiction over the matter and referred the complaint to the Department of Education's Office of Special Education and Rehabilitative Services ("OSERS") in July 1994. OSERS later notified plaintiff that it had referred his complaint to the State of Delaware for processing.

On May 14, 1996, plaintiff filed suit against DDPH in the United States

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[1] The court notes that the facts essentially are undisputed.

District Court for the District of Delaware, alleging violations of 42 U.S.C. § 1983. He subsequently amended his complaint to add § 504 discrimination allegations. Specifically, he alleged that the withholding of diagnostic information and the mislabeling of disabled children "results in discrimination against the handicapped because it misleads families away from government-funded education, social and medical services." (D.I. 3 at A63) Plaintiff further alleged that he was discriminated and retaliated against in his employment when he refused to comply with and complained about DDPH's alleged policy of withholding diagnostic information.

On June 20, 1996, plaintiff filed a complaint with OCR, alleging the § 504 portions of his amended complaint in the District Court action. In light of the pending litigation, OCR declined to seek resolution of plaintiff's complaint, informing plaintiff that he could refile it within 60 days of resolution of the then pending litigation.

The District Court subsequently dismissed plaintiff's amended complaint in August 1997, which dismissal was affirmed by the Third Circuit Court of Appeals in February 1998. The Supreme Court denied certiorari on June 1, 1998.

On June 3, 1998, plaintiff refiled his complaint with OCR. On July 14, 1998, OCR wrote plaintiff, informing him that it did not have jurisdiction to consider his allegations concerning the withholding of diagnostic information. (D.I. 6 at A1) In that regard, OCR referred plaintiff to the

Family Policy Compliance Office. (D.I. 6 at A1) OCR further indicated that it would not review plaintiff's allegations of discrimination and retaliation in his employment as they had been the subject of litigation. (D.I. 6 at A2) OCR informed plaintiff that it was closing its file on the matter. (D.I. 6 at A2)

Despite OCR's response, plaintiff continued to pursue his complaint with that office. By letter dated March 19, 1999, OCR informed plaintiff, inter alia, that

> OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving Federal financial assistance. The D[D]PH is a recipient of Federal funds from the Department. However, the subject matter of your complaint does not involve issues covered by the regulations enforced by OCR. This fact prevents OCR from moving to complaint resolution in this matter.
>
> Because your complaint involves issues of medical ethics or medical malpractice, your complaint would be more properly reviewed by the U.S. Department of Health and Human Services. . . .
>
> OCR procedures require that complaints be filed within 180

days of the date of an alleged discriminatory act. Your OCR complaint is untimely, with regard to issues concerning employment, retaliation and alleged discriminatory practices during you tenure at D[D]PH, as there were several periods of time in excess of 180 days between the last date(s) of alleged discrimination in this matter and any action you took pursuant to the filing of your complaint. OCR procedures allow for waiving that requirement when such complaints are filed within 60 days of the termination of any administrative or judicial proceeding. However, the materials you have submitted indicate that there are several periods of time in excess of 60 days between the termination of an administrative or judicial proceeding and any subsequent action you took pursuant to the filing of a complaint with OCR. Primarily, the material you have provided indicates that D[D]PH refused to rehire you in June, 1989. There was then a four-year hiatus between that date and July or August 1993, when you indicate that you wrote to Thomas Carper, Governor of Delaware and Carmen Nazario, Director of DPH, to report these illegal practices after DPH refused a second time to hire you in July, 1993. We also note that the U.S. District Court also found your complaint to be untimely.

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> With regard to your allegation that D[D]PH discriminated against you in its employment practices, as we informed you in our letter of July 14, 1998, OCR will not proceed to complaint resolution on allegations which have been the subject of litigation and for which a decision on the merits, including dismissal with prejudice, has been rendered. Similarly, if a matter that was in litigation has been settled, OCR will not proceed. We have reviewed the decision of the United States Court of Appeals for the Third Circuit, Docket Number 97-7521, affirming the dismissal of your complaint by the District Court for Delaware. OCR will not review those matters which have been adjudicated by the Federal Courts.

(D.I. 6 at A52-56)

On July 20, 1999, plaintiff filed this lawsuit against defendant. In his complaint, plaintiff alleges that OCR mishandled his § 504 allegations against DDPH and thereby violated his Fifth Amendment due process rights. Plaintiff's complaint contains fourteen (14) causes of action, which essentially fall into three categories. Counts 1 through 3 allege that OCR mishandled the complaint when it determined that it did not have jurisdiction to consider some of the allegations therein. Courts 4 through 13 allege that OCR misapplied the relevant statute of limitations to plaintiff's allegations. Count 14 alleges that OCR misapplied the doctrine

of res judicata to those allegations that had been addressed in the District Court action.

III. STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), a court primarily must consider the allegations contained in the complaint, although matters of public record, orders, items appearing in the record of the case as well as exhibits attached to the complaint may also be taken into account. See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). In ruling on a 12(b)(6) motion, the factual allegations of the complaint must be accepted as true. See Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam). Moreover, the court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from those allegations. See Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746 (1963); Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). Accordingly, the court must resolve any ambiguities concerning the sufficiency of the claims in favor of the plaintiff. See Hughes v. Rowe, 449 U.S. 5, 10 (1980) (per curiam). Thus, the "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); accord Ransom v. Mazzaro, 848 F.2d 398, 401 (3d Cir. 1988). Where, as here, the plaintiff is a pro se litigant, the court has an obligation to construe the complaint

liberally. See Haines v. Kerner, 404 U.S. 519, 520-521 (1971); Gibbs v. Roman, 116 F.3d 83, 86 n.6 (3d Cir. 1997); Urrutia v. Harrisburg County Police Dept., 91 F.3d 451, 456 (3d Cir. 1996).

IV. DISCUSSION

Arguing that OCR's investigation did not implicate any adjudicatory powers, defendant seeks to dismiss plaintiff's complaint for failure to state a claim on which relief can be granted. The Supreme Court in Hannah v. Larche, 363 U.S. 420 (1960), held that persons whose conduct is under investigation by the United States Commission on Civil Rights are not entitled by virtue of the due process clause of the Fifth Amendment to rights such as apprisal, confrontation, and cross-examination. See id. at 441-46. The Court noted that

> "[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Id. at 442. In rejecting the appellants' challenge to the procedures of the Civil Rights Commission, the Court emphasized

the investigatory function of the Commission:

> [I]ts function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Id. at 441. The Court concluded that

> when government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Id. at 442.

The Court reaffirmed its decision in Hannah and elaborated further on the distinction between investigative agencies and adjudicatory or accusatory agencies in Jenkins v. McKeithlen, 395 U.S. 411 (1969). In Jenkins, the Court found that the plaintiff had stated a cause of action that the procedures of the Louisiana Labor-Management Commission of Inquiry failed to meet the requirements of due process. See id. at 431. After reviewing the Act authorizing creation of the Labor-Management Commission, the Court distinguished that body from the Civil Rights Commission in Hannah. While the Labor-Management Commission

> does not adjudicate in the sense that a court does, nor does the Commission conduct, strictly speaking, a criminal proceeding . . . [n]evertheless, the Act, when analyzed in light of the allegations of the complaint, makes it clear that the Commission exercises a function very much akin to making an official adjudication of criminal culpability . . . . In short, the Commission very clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public.

Id. at 427-28. Given this view of the purpose of the Labor-Management Commission, the Court concluded that

its procedures did not meet minimal due process requirements, specifically mentioning the Act's limitations on the rights of a person being investigated to confront and cross-examine the witnesses against him. See id. at 428. Thus, in order for due process protections to attach, the inquiry must go beyond an investigation and become accusatory in nature. See Hannah, 363 U.S. at 442. Consistent with this precedent, the court must first determine the nature and function of OCR's action with respect to plaintiff's allegations, and then decide whether, in light of this finding, the procedures complained of violate the due process clause of the Fifth Amendment.

OCR is responsible for enforcing § 504 of the Rehabilitation Act and it implementing regulation, 34 C.F.R. Part 104, which prohibits discrimination on the basis of handicap in any program or activity receiving Federal financial assistance. 34 C.F.R. § 104.1 (1999) Consistent with this mandate, OCR has the duty to conduct investigations whenever a complaint alleging discrimination is filed by "[a]ny person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part."[2] Id. at § 100.7(b). Included

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[2]The procedural requirements of the regulation implementing Title VI of the Civil Rights Act of 1964 are incorporated by reference in the regulation implementing § 504 of the Rehabilitation Act. See 34 CFR § 104.61.

within the ambit of protected activity is the filing of complaints; thus, the harassment or intimidation of individuals who file complaints with OCR is prohibited. See id. at § 100.7(e). Investigations conducted by OCR

> include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

Id. at § 100.7(c). If discrimination is detected, the Secretary of the Department of Education or his designee is directed to inform the recipient of the matter and attempt resolution through informal means. In order to overcome the effects of discrimination, the Assistant Secretary of OCR may require the recipient to take such remedial action as is deemed necessary. See id. at § 104.6. If the noncompliance cannot be corrected through informal avenues, the Secretary of the Department of Education may effect compliance

> by the suspension or termination of or the refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce

> any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

Id. at § 100.8(a). An order terminating, suspending, or refusing to grant or continue Federal financial assistance cannot be effected until the applicant or recipient has been given notice and the opportunity for a hearing. See id. at § 100.8(c).

In the case at bar, OCR's investigation of plaintiff's allegations of § 504 violations did not implicate any adjudicatory powers. Rather, OCR merely processed the complaint pursuant to federal regulations, an investigative as opposed to an adjudicative function. In so doing, OCR determined it did not have jurisdiction to pursue plaintiff's allegations. OCR having made such a determination, the Secretary of the Department of Education was in no position to exercise his adjudicatory power to terminate a recipient's Federal funding. In the absence of the exercise of adjudicatory power, i.e., when only the investigative powers of an agency are utilized, due process considerations do not attach. See, e.g., Hannah, 363 U.S. at 442; United States v. Elias, 465 F.2d 765, 769-70 (3d Cir. 1972); Popovic v. United States, 997 F. Supp. 672, 678. In processing and investigating plaintiff's complaint, OCR did not affect plaintiff's legal rights. At all times, plaintiff was free to file suit against the DDPH under

§ 504 of the Rehabilitation Act of 1973, and the actions of OCR had no effect on such claims or their de novo review by a court of competent jurisdiction.[3] See, e.g., Connor v. EEOC, 736 F. Supp. 570 (3d Cir. 1990); Francis-Sobel v. University of Maine, 597 F.2d 15 (1rst Cir. 1979). Accordingly, to the extent that plaintiff is arguing he had a property or liberty right to have OCR's investigation continue or be conducted in a particular way, his claim has no foundation in law as he had no entitlement to any particular set of due process protections in connection

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[3] As noted above, plaintiff did file suit in the United States District Court for the District of Delaware, alleging violations of § 504. That the suit was dismissed with respect to plaintiff's allegations of discrimination and retaliation in his employment for failure to assert standing is irrelevant to the analysis at bar.

with OCR's investigation.[4]

V. CONCLUSION

For the foregoing reasons, the court finds that plaintiff's complaint fails to state a cause of action against defendant Richard W. Riley, Secretary, United States Department of Education. Accordingly, the court shall grant defendant's motion to dismiss. (D.I. 15)

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[4]Having so decided, the court need not address defendant's assertion that plaintiff has no private right of action against the Department of Education under § 504 and no right of direct action against the Secretary or the Department of Education under the Administrative Procedure Act.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5523

Robert D. Cunningham Jr., M.D.,

Appellant

v.

CARMEN R. NAZARIO, Secretary Delaware Department of Health and Social Services; CHARLES KONIGSBERG

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, and FUENTES, Circuit Judges

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SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the

court en banc, the petition for rehearing is DENIED.

BY THE COURT
/s/M Trump Barry
Circuit Judge

DATED: October 4, 2000

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

U.S. Constitution - First Amendment - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution - Fifth Amendment - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Constitution - Fourteenth Amendment - Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Associated statute

42 U.S.C.S. § 1983 - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statutory provision

Section 504 of the Rehabilitation Act of 1973 - No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Regulations implementing Section 504

34 CFR § 100.7 (b) Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

34 CFR § 100.7(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Regulations associated with IDEA

34 CFR § 303.344 Content of an IFSP (Individualized Family Service Plan)

(a) Information about the child's status. (1) The IFSP must include a statement of the child's present

levels of physical development (including vision, hearing, and health status), cognitive development, social or emotional development, and adaptive development.

Associated rule - Delaware Family Service Plan Instructions:
The purpose of the IFSP is to identify and organize formal and informal resources to facilitate families' goals for their children and themselves. Each IFSP is to be centered around the individual child and family and considered a fluid document which evolves and changes as the child and family grow and develop. Procedures for the Individualized Family Service Plan (IFSP) process are contained in the Delaware Part H Program Operations Manual. These should be reviewed prior to the development of the IFSP. The following instructions are to be used in the completion of the IFSP form. . . .

Section 1. Identifying Information
B. Include the child's risk factor (ICD-9) or diagnosis, ISIS number, Medicaid number and/or family insurance company and policy number.

34 CFR § 303.401 Definition of consent
As used in this subpart--
(a) Consent means that--
(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communi-

cation;
(2) The parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

34 CFR § 303.404 Parent consent
(a) written parental consent must be obtained before--
(1) Conducting the initial evaluation and assessment of a child under § 303.322; and
(2) Initiating the provision of early intervention services (see § 303.342(e)).
(b) If consent is not given, the public agency shall make reasonable efforts to ensure that the parent--
(1) Is fully aware of the nature of the evaluation and assessment or the services that would be available; and
(2) Understands that the child will not be able to receive the evaluation and assessment or services unless consent is given.

Lead Agency Procedures for Resolving Complaints

34 CFR § 303.510 Adopting complaint procedures - Each lead agency shall adopt written procedures for--
(a) Resolving any complaint that

any public agency is violating a requirement of Part H of the Act or this part by--
(1) Providing for the filing of a complaint with the lead agency; and
(2) At the lead agency's discretion, providing for the filing of a complaint with a public agency and the right to have the lead agency review the public agency's decision on the complaint; and
(b) Informing parents and other interested individuals about the procedures in §§ 303.510 through 303.512.

34 § 303.511 - An organization or individual may file a complaint
An individual or organization may file a written signed complaint under § 303.510. The complaint must include--
(a) A statement that the State has violated a requirement of Part H of the Act or the regulations in this part; and
(b) The facts on which the complaint is based.

34 CFR § 303.512 Minimum State complaint procedures. - Each lead agency shall include the following in its complaint procedures:
(a) A time limit of 60 calendar days after a complaint is filed under § 303.510(a) to--
(1) Carry out an independent on-site investigation, if the lead agency determines that such an investigation is necessary;
(2) Give the complainant the opportunity to submit additional

information, either orally or in writing, about the allegations in the complaint;
(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part H of the Act or of this part; and
(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains--
(i) Findings of fact and conclusions; and
(ii) The reasons for the lead agency's final decision.
(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.
(c) Procedures for effective implementation of the lead agency's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.
(d) The right of the complainant or the public agency to request the Secretary to review the lead agency's final decision.

Federal Rules of Civil Procedure

F.R.C.P. Rule 60(b)

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake,

inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1265, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Delaware State Merit Rules

19.0100 - Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited.

20.0330 - In the event the employee is still not satisfied regarding the grievance, he may, within five (5) working days of receipt of the written reply, present a written request for a review of the grievance by the head of the agency (e.g. Cabinet level). The head of the agency or his/her designee shall, within ten (10) working days of receipt of such request, meet and discuss the grievance with the employee and his/her representative, if any, and issue his/her decision to the employee in writing within ten (10) working days of said meeting. (revised June 8, 1991)

20.0410 - Any employee who takes his employment problems outside of the classified service without first attempting to resolve said problems in accordance with the procedures outlined above shall be subject to disciplinary action. However, nothing in this section shall be deemed to abrogate any legal means of redress to the courts, or appropriate State or Federal agencies, or prohibit consultation with a union representative.